(18,741)

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 162.

Lena M. Slater, W. G. Slater, Jesse R. Slater,
Annie E. Slater and Henry G. Slater,
Petitioners.

-vs.-

MEXICAN NATIONAL RAILROAD COMPANY,

On Writ of Certiorari to the United States
Circuit Court of Appeals for Fifth Circuit.

Brief of Respondent in Error,
THE MEXICAN NATIONAL RAILROAD COMPANY.

In order that this Honorable Court may fully understand the contention of the Mexican National Railroad Company, we shall reproduce here, for information of this Honorable Court, our brief, upon which the case at bar was submitted to the Court of Appeals

before making reply to the alleged specifications of error by petitioners to the decision of the Court of Appeals.

The brief of Plaintiff in Error in the Court of Appeals, Respondent in this Court, omitting Court and style of case, is as follows to-wit:

This cause was instituted by defendants in error against plaintiff in error on the 17th day of November A. D. 1900, in the United States Circuit Court in and for the Western District of Texas at the Laredo Division thereof, wherein Lena M. Slater as surving wife of W. H. Slater, and as next friend of William F. Slater, Annie E. Slater and Henry G. Slater, minor children of said Wm. H. Slater, sue to recover damages for personal injuries sustained by said Wm. H. Slater on the 20th day of May A. D. 1900, while in the employ of plaintiff in error as switchman or brakeman in its yards in the City of Nuevo Laredo, Republic of Mexico, resulting in the death of said W. H. Slater on the 21st day of May, 1900. The specific allegations upon which defendant in error base the right of recovery are: 1st. That plaintiff in error was negligent in failing to furnish reasonable safe and suitable appliances, machinery and cars for the said W. H. Slater to work with and about, in that it failed to furnish cars with drawheads of same height. 2nd. That said W. H. Slater in the performance of his duty as switchman went in between two cars to couple them together, that the drawheads were not of even height or opposite to each other, but upon the contrary the the drawheads were so unequal in height that when said cars came together one of said drawheads could pass over the other, and when W. H. Slater went between said cars to make said coupling, one of which cars was standing still and the other moving, the drawheads of the moving car passed above and on top of the other, permitting the ends of the two cars to come together and mash and injure the said W. H. Slater so that he died on next day. 3rd. That defendants in error were wholly

dependent upon W. H. Slater for support. 4th. That W. H. Slater was a man of good moral character and at time of his death was earning about $125 per month and that he practically gave it all to their support and maintenance. 5th. That under the laws of Mexico it is among other things provided that the coaches and cars which enter into the make up of a train shall have drawheads of the same height so that their centers will be opposite to each other. 6th. That under the laws of Mexico the surviving wife and children are entitled to damages against the person committing the homicide. The defendant in error sets up at great length the law of Mexico, which will hereinafter be noticed in so far as the same may relate to the rights of the parties hereto, or as may be necessary for this court to notice in its dispositions.

To this petition plaintiff in error on the 4th day of December, 1900, interposed the following General and Special Demurrers:

"Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

"1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrong charge to have resulted in the death of William H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

"2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, are not similar or analogious to the laws of Texas, but that the same are dissimilar and different from the laws of Texas, in this, that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this, that they are dissimilar in many other respects made obvious by an explanations of the laws of

Mexico plead by plaintiffs; and in this, that under the laws of Texas, it is provided that in order to authorize a recovery for the death of another that the wrongful act, negligence, carelessness, unskilfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, whereas there appears no such limitation upon the survivor under the laws of Mexico, upon the contrary, it appears that a cause of action in favor of certain named persons would exist, notwithstanding the injured person during life has extinguished said cause of action; and in this, that under the laws of Texas, in like cases, the recovery would be in "in solidum," while under the Mexican laws plead such a recovery is not intended or contemplated, but must be in installments not to exceed the amounts contributed by the deceased during life in support of the beneficiaries or persons entitled to be supported by the deceased.

"3rd. And especially further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which are set up in plaintiff's petition; that said laws has no extra-territorial effect, and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

"4th. And for further exception, it does not appear that said cause of action is by all parties authorized under Mexican law to maintain an action for recovery of damages, nor does it appear for the use of all persons, that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the wife and children not negativing the existence of others entitled to recover under the Mexican law and is therefore

not authorized by the Texas statute, but is in direct violation thereof, and if entertained, would subject defendant to a multiplicity of suits, contrary to the well established policy of Texas.

"5th. And for further exception defendant says, the laws of Mexico, as plead, are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

"Of all of which defendant prays judgment of the Court."

Which General and Special Demurrers the court overruled on December the 5th, 1901, (Trs. p. 14) to which ruling of the court plaintiff in error then and there excepted by saving its bill of exceptions (Trs. pp. 23-26). Subsequently on March 15th, 1901, in addition to its demurrers filed December the 4th, 1900, plaintiff in error presented an additional Special Exception or Demurrer to defendant in error's petition, to wit: "Defendant excepting further says that it affirmatively appears from plaintiffs' petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas and of the common law that this court cannot administer or enforce said laws and rights" (Trs. p. 15). Which exception the Court on the 29th day of March, 1901, overruled, to which ruling the defendant then and there excepted by proper bill of exception (Trs. pp. 36 and 37).

Plaintiff in Error in addition to its demurrers answered, first, by a General Denial, and second, pleaded specially as follows:

"2d. Defendant excepting further says that it affimatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so

dissimilar from the laws of Texas and of the common law that this Court cannot administer or enforce said laws and rights.

"And of this defendant prays judgment of the Court.

"MEX. NAT. R. R. CO., Deft.,
By THOS. W. DODD, Atty.

"Comes defendant again, not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, and in the event that this Court shall overrule its said plea and exceptions, denies all and singular the allegations in said petition contained and demands strict proof thereof, and of this defendant puts itself upon the country.

"And for further plea in this behalf, defendant shows that this Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico, set up as a basis of the damages sought to be recovered, because the laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pension, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters and when the boys arrive at the age of 21 years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and, thereiore, our Courts, neither in law or in equity, have the power and authority to create a remedy for the enforcement of such a right, and of this defendant prays judgment of the Court and puts itself upon the country.

"And again comes defendant and shows that the laws of

Mexico as pleaded, when construed in connection with other provisions of the Mexican laws securing a right of recovery in surviving wives, mothers, fathers, husband and children, for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and of Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures a right of alimony, or in the nature of a pension, and therefore secures a right of recovery unknown to the laws of Texas and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed, and of this defendant prays judgment and puts itself upon the country.

"And for further answer in this behalf, defendant shows that plaintiff ought not to have and maintain their action because at the time of the accident in which William H. Slater was injured and for a long time anterior thereto, he, the said William H. Slater, was in the employ of defendant company as a brakeman, and that the injury he suffered was the direct and proximate result of his, the said William H. Slater's own negligence and carelessness in the performance of his duty as such brakeman, and of this defendant puts itself upon the country."

To this answer defendant in error specially demurred as follows:

"Now comes plaintiffs by leave of Court and files this their first supplemental petition in replication to the first amended original answer of defendant, filed on March 18th, 1901, and demurs to the matters and things therein pleaded because the same constitute no defense to the cause of action.

"And especially because the laws referred to relating to alimony and pension, viz: articles of the Civil Code mentioned, are

provisions of the laws of Mexico regulating matter growing out of the marriage relation, involving the duties and obligations of parties to the marrriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference between the laws of Texas, of the United States and Mexico, as to the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States.

"And further excepting especially, because the provisions of the laws referred to, viz: Arts. 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony and in no sense can they be the foundation for a defense to the action.

"And of this defendant (plaintiff) prays judgment of the Court."

Which exception the Court sustained, to which ruling plaintiff in error excepted by proper bill of exception (Trs. pp. 37, 38 and 39).

Upon this state of the pleadings both parties answered ready for trial, which trial resulted in a verdict and judgment in favor of defendants in error for the sum in the aggregate of $7,000.00.

Plaintiff in Error relies upon its assigned errors, transcript pages 73, 74, 75, 76 and 77, and which errors are as follows, to wit:

"1st. That Honorable T. S. Maxey, the Judge presiding, erred in overruling defendant general and special exceptions to plaintiff's original petition, and especially in overruling exceptions numbered one, two, three, four and (5) five.

"2nd. That the said Court erred in overruling defendant's special exception number two, filed on the ..... day of March, 1901, to plaintiff's original petition to the effect that it appeared from the laws of Mexico set up in plaintiffs' said petition that the right secured to plaintiffs to recover for personal injuries of W. H. Slater resulting in his death was in the nature of alimony or pension payable monthly or in installments, and that therefore the Courts of this country had no jurisdiction or power to enforce such a right.

"3rd. That said Court erred in sustaining plaintiff's special exception to defendant's amended original answer filed on the..... day of March, 1901, wherein defendant pleads that the Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico set up as the basis of the damages sought to be recovered, because said laws are unlike and dissimilar to the laws of Texas in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children, is the right of alimony or pension to be paid monthly and in installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of surviving wife and daughters, and when the boys arrive at the age of twenty-one years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, in that the laws of Texas have provided no remedy for the enforcement of such a right. That the laws of Mexico, as pleaded by plaintiff, when construed in connection with provisions of the Mexican laws securing a right in surviving wives, mothers, fathers, husbands and children for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District and Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures the right of alimony, or in the nature of a pension,

and therefore secures a right unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed.

"4th. The said Court erred in sustaining the exceptions of plaintiffs to defendant's offer to read in evidence to the Court and jury the testimony of Emilio Velasco, taken by deposition and returned into Court by consent of counsel, and which evidence rejected is in substance as follows, to-wit: That said Emilio Velasco is a native citizen of Mexico; that he is a lawyer in Mexico by profession and has been since January, 1860; that he was a graduate of the law school of the City of Mexico, graduating in January, 1860; (4) that he was familiar with the laws of Mexico and of the States of Nuevo Leon and Tamaulipas, in force now and that were in force for two years past, touching the right of surviving wife and children to recover damages for personal injuries resulting in death of the husband and father; (6) that the right of the surviving wife and children in a civil suit for damages where no criminal proceeding had been had, and the defendant had been absolved, it was necessary as a precedent to a recovery, that the Court trying the civil cause find that the killing or injury was a crime, as defined by the Criminal Code; (7) that the right was in the nature of alimony or pension to be paid in installment monthly for a period of time to be fixed by the Court; that the obligation to pay alimony to the wife and children, does not imply that of giving of a sum larger or smaller at once, but that of giving a pension. Alimony compromises meals, dress, habitation and assistance in case of sickness; and as regards minors, besides the necessary expenses of education of the party supported, and for the furnishing him a trade, art or profesion, honest and suitable to the sex and personal circumstances; (8) that the party obliged to give alimony complies with this obligation by assigning a competent pension, or incorporating him into his family; (9) that the obligation to furnish alimony or

support, as a consequence of civil responsibility, last all the time which the deceased ought to have lived, calculating that time according to the table of probabilities which is a continuance of article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased; but this obligation would cease at any time when it was not absolutely for the subsistence of the parties to receive it; therefore, that the obligation ceases from the moment in which the conditions of fortune of the parties who receive alimony vary allowing them to subsist without the necessity of alimony. It ceases with the wife and daughters when they marry, and with the sons when they arrive at twenty-one years of age; and it ceases when circumstances are produced that, according to law the obligation of giving would have ceased on part of the deceased if he had lived; (10) that civil responsibility is based upon an infraction of the Criminal Code. It is the infraction that gives, or engenders, civil responsibility; (11) in case that the deed of fault or negligence, or to the omission which caused the injury, he is coauthor of the offense or fault, and his representatives can not recover; (12) that the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband and father, when the accident in which said injury occurred was caused by the fault, or negligence, or omission of the one who suffered the injury, or if he contributed in any way with his fault, negligence or omission to the accident.

"5th. The said Court erred in refusing in giving in charge to the jury defendant's special request No. 1, and which was as follows: "The jury are instructed to find a verdict for the defendant."

"6th. The Court erred in refusing to give in charge to the jury defendant's special charge, in words as follows: 'The jury are instructed that William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering to the service of defendant, assumed all the risks ordinarily incident to said service, and in

this connection you are instructed that the risks assumed by him include all open and visible defects. And if you believe from the evidence that the said William H. Slater was injured while undertaking to remove a pinched pin and link, or pin or links, with knowledge of their conditions upon a moving car, then in that event you will find for the defendant.

"7th. The said Court erred in refusing to give in charge to the jury the following special instruction requested by the defendant, to-wit: 'The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was injured and killed by reason of the fact that the drawheads of the cars to be coupled together were of uneven height, and that such condition was known to William H. Slater, and that he, the said William H. Slater, was careless, or that he, the said Slater, in trying to couple the said cars failed to use that degree of care and caution usually adopted by a prudent person in the performance of said service, then in that event, he was guilty of contributory negligence, and you will find for the defendant.

"8th. The said Court erred in refusing to give in charge to the jury defendant's special instruction in words as follows, to-wit:

" 'The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was attempting to couple two cars together, and that said drawheads of both had in them pinched pins and links, and that said physical condition was known to said William H. Slater, and that in attempting to make such coupling under such conditions, was inconsistent with that ordinary care and prudence that would be used by an ordinarily prudent man under similar circumstances, then you will find for the defendant.'

"9th. The said Court erred in refusing to give in charge

to the jury defendant's special instruction in words as follows: to-wit:

"'The jury are instructed that in event you find in favor of plaintiffs, then you will by your verdict, find: first, what sum of money, if any, the said William H. Slater, at the time of his death, was contributing toward the support of his wife and his children (plaintiffs in this suit) per month, specifying the amount in dollars and cents; second, you will find what proportion of said sum was contributed by said William H. Slater to the said Lena M. Slater, and what proportion to each of the minor children, and in this connection you are instructed that the said sum in the aggregate must not exceed the sum of money he contributing to their support during his, W. H. Slater's life and at and before his death.

"10th. The said Court erred in giving in charge to the jury that portion of its main charge in words as follows, to-wit:

"'The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, or for physical or mental suffering which the deceased himself may have endured. If he had been simply injured and not killed, and brought suit himself, the rule would have been otherwise, for in that case the law would permit him to recover, if entitled to recover at all, damages for physical and mental pain. But in cases of this kind damages, as before stated, must be measured by the pecuniary standard, that is the money value of the life of the deceased to the surviving wife and children. And the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their own knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of deceased. See 75 Texas, 67 and 69.'"

The questions involved are, 1st, that the trial Court erred in overruling plaintiff in error's General and Special exceptions urged to defendants in error's petition filed December 4th, 1900, and filed March 18th, 1901. The general and special demurrers necessarily involve, 1st, the laws of Mexico, the place where the injury occurred, and their proper construcion; 2nd, the nature of the right secured to surviving widows and children to damages; 3rd, the power and authority of the Circuit Courts of the United States to administer the laws of Mexico and grant the right secured by the laws of Mexico under such circumstances; 4th, manner of proving and construing the laws of a foreign country. Not only do these questions arise from the exceptions urged by plaintiff in error to defendants in error's petition, but they arise out of plaintiff in error's special defenses pleaded in bar of defendants in error's right to recover and which is fully specified in our 3rd error assigned, and which the trial Court sustained exceptions to (Trs. p....).

The next question involved arises out of the action of the Court in sustaining exceptions of defendants in error to plaintiff in error reading in evidence to the Court and jury the testimony of Emilio Velasco, a man learned in the laws of Mexico, as to the laws of Mexico and the nature of the right in survivors of deceased persons through injuries wrongfully sustained, and as to proper construction of the laws of Mexico affecting such right.

The other questions involved arise out of the refusal of the Court to give in charge to the jury certain special charges requested and refused, and to the charge of the Court given.

Before presenting our views why we believe the learned trial judge committed error in overruling plaintiff in error's general and special exceptions to defendants in error's petition or complaint and in sustaining defendants in error's special exceptions to plaintiff in error's answer as pled, we ask this Court's consideration to the action of the trial Court in sustaining defendants in

error's objection to the testimony of Emilio Velasco as taken by deposition. The objection to this testimony is on the ground that the statutory law of Mexico, as pled, is best proved by the statutes themselves and the statutes having been offered in evidence, the depositions of the witnesses named as to what the law is, is inadmissible (Trs. p. 41). This objection the Court sustained and refused to allow same read to the Court or jury. This action is manifest error as we conceive the law to be: 1st. In that it assumes that the statutory law of Mexico is all of the law in cases of the character of the suit at bar affecting the right of a recovery. 2nd. That it assumes that it is incompetent to offer testimony of one learned in the laws of a foreign tongue and country, as to what the law is, whether written or unwritten; and 3rd. That it assumes that if it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute in a foreign tongue and country.

We submit, first, that it is elementary that foreign unwritten laws customs and usages may be proved by parol evidence. Green Leaf on Evidence, 13th Ed. P. 636 and section 488 and authorities cited.

2nd. That the usual course is to make proof by the testimony of competent witnesses, learned and instructed in the laws, customs and usages of such country. See above authority.

REMARKS.

It will be observed by the Court that the only evidence offered as to the laws of Mexico having application to the facts pled or right of plaintiffs and defendant is to be found in transcript page 21, where it is agreed by counsel upon both sides that the translations of the Laws of Mexico, as set up in plaintiffs' petition and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case are correct

translations of the laws they purport to be translations of, taken from the respective Codes in said petition mentioned. And it is further agreed that the laws described in defendant's original answer and plaintiffs' supplemental petitition are the laws of Mexico having aplication to this case.

This agreement as quoted constitute the testimony in relation to the laws of Mexico, It in no manner negatives or tends to negative the existence of written or unwritten laws of Mexico having application to the question involved other than the laws pleaded. Under this state of the facts and proof, the testimony of Emilio Velasco, a man learned in the laws of Mexico, was pertinent and proper as to the nature of the right in survivors to recover damages in cases of tort. The evidence was offered both to the Court and jury and it was admissible to be considered by the Court, as all matters of law are primarily referable to the Judge in order to enable him to properly instruct the jury in any particular case. See Greenl. on Evidence, Sec. 486.

We further submit that it was competent evidence, even granting that its purpose was to prove by an expert, the existence or prevailing construction of the statutes of Mexico, a foreign country, and whose language is different from ours. See Kline vs. Baker, 99 Mass 254.

In Baron de Bode vs. Reginam, 10 Jur. 217, Lord Denman C. J. in discussing a similar question says: "I think that credit must be given to the opinion of legal men, who are bound to know the law of the country in which they practice, and that we must take from them the account of it whether it be unwritten law, which they may collect from practice, or the written laws, which they are also bound to know. The instrument (or statute) itself might frequently mislead and it might be necessary that the knowledge of the practitioner should be called to show that the sense in which the instrument (or statute) would naturally be

construed by a foreigner is not its true legal sense." This reasoning of one of England's ablest jurists, may not in its entirety be correct, but it illustrates the importance of the evidence of men skilled in the science of the law of a foreign tongue as an aid to our Courts when called upon to construe foreign statutes, translations of which are offered to determine the rights. We admit that the trial Judge had the discretion to reject the offered testimony and proceed upon his own knowledge of the foreign laws, and that the judgment will not be reversed for that cause unless it should appear that the Court was mistaken as to those laws. See State vs. Rood, 12 Vt. 396. In support of our theory that the Court trying this case was mistaken as to the Laws of Mexico, that must be conceded as determining the rights of the plaintiff and defendant, we quote the record as follows: The trial Judge upon the right of plaintiffs instructed the jury that "in cases of this kind the damages, as before stated, must be measured by the pecuniary standard that is, the money value of the life of the deceased to the surviving wife and children; and the jury acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their knowledge, experience and sense of justice may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from death of the deceased." (Trs. p. 69). In another portion of the charge the learned Judge says: "In cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages." This measure of recovery is the enforcement of the right fixed by the law of Texas and not a measure of right secured under the laws of Mexico. Arts. 311, 318, 319, 320 and 325, Penal Code Book 2, Laws of Mexico pled by plaintiffs fix the right of survivors in cases of homicide wrongfully done. (Trs. pp. 6 and 7.) Article 318 specifies what damages are comprehended as civil responsibility for a wrongful homicide, and comprehends "the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations

to do so, but also to the posthumous descendants that he may leave."

Art. 319 reads: "The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judge according to the table at the end of this chapter, but taking in consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1st. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2nd. When those beneficiaries shall get married. 3rd. When the minor children become of age. 4th. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." Now the testimony rejected is that of an expert, one skilled in the science of the laws of Mexico, and is "that the right was in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court; that obligation to pay alimony to the wife or children, does not imply that of giving a sum larger or smaller at once, but of giving a pension. That the party obliged to give alimony, complies with the obligation by assigning a competent pension, or by incorporating him into his family. That the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of Article 325, Penal Code, bearing in mind, however, the condition of the health of the deceased: but that this obligation would cease at any time when it is not absolutely necessary to the subsistence of the parties who receive it; therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary allowing them to subsist without the necesity of the alimony. It ceases with the wife and daughters when they marry, and with sons when they become of age; and it ceases when circumstances are produced that, according to law,

the obligation of giving would have ceased on the part of the deceased if he had lived. In case the injured party has contributed to the deed or default or negligence or to the omission which caused the injury, he is coauthor of the offense or default and his representatives cannot recover. That the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury or if he contributed in any way with his fault negligence or omision to the accident."

We have quoted the charge of the Court and the law of Mexico having reference to and fixing the right in survivors to damages, and the testimony of the witness whose evidence the Court rejected, in order to demonstrate: 1st. That the trial Court erred in rejecting said evidence, because he was mistaken as to a proper construction of the laws of Mexico pled, and because he, the trial Court, really ignored the Mexican Laws in so far as they relate to the right secured to surviving wives and children to a support of the one wrongfully causing the death of their deceased husband and father.

We confidently submit that our fourth error is well taken, and such error requires a reversal of the judgment of the lower Court.

This brings us now to a consideration of our first and second and third errors that we propose to submit together, as they all three refer to the same subject and may well be considered together by us and this Court.

Upon the questions presented by our three errors assigned we submit: 1st. That it affirmatively appers that the injuries resulting in the death of W. H. Slater occurred in Nuevo Laredo, Mexico, and that therefore the rights of the plaintiffs who sue to

recover damages must be measured by the Laws of Mexico the country where the accident occurred. 2nd. That in this character of suits the *lex loci* absolutely governs as to the right. 3rd. That the laws of a foreign country have no extra-territorial power and effect, and cannot confer upon the Courts of this country a power denied by the law creating our Courts. 4th. That the Circuit Courts of the United States are Courts whose jurisdiction and powers are defined by the statutes of the United States. 5th. That the United States Circuit Courts, as law courts, have no jurisdiction, power or authority to administer equitable relief, or to adjudicate upon rights not capable of being enforced by a judgment final securing such right.

These five propositions will certainly be conceded to be correct principles, and bearing these in mind we submit that the exceptions of plaintiff in error to defendants in error's petition are well taken, because it affirmatively appears from the petition that the wrong charged to have resulted in the death of Wm. H. Slater occurred in the Republic of Mexico and not within the jurisdiction of the United States; second, because it affirmatively appears from the laws pled by the defendants in error that the laws of Mexico, where the wrong occurred, are not similar or analogious to the laws of Texas, but upon the contrary are dissimilar and different from the laws of Texas; third, that it affirmatively appears from the laws of Mexico set up in defendants in error's petition that the right of survivors to recover damages for personal injuries resulting in death is in the nature of alimony or pension, payable in installments and is therefore so dissimilar from the laws of Texas and of the Common Law that the Courts of the United States on their law side, cannot administer or enforce said laws and rights.

Under these propositions it becomes necessary to examine the laws of Mexico set up by the defendants in error. The provisions of the laws of Mexico relating to the right, as pled, are to

be found in the transcript on pages 6 and 7, and may include articles 308 to and including Art. 319, Penal Code, Book 2, as described in the defendants in error's petition. Arts. 308, 309, 310 and 311 are really immaterial or rather, in fact, cannot aid the Court in properly answering the questions raised by the exceptions presented. Art. 318 reads: "The civil responsibility that grows out of a homicide done without right, or justification, comprehends the payment of the indispensable expenses of the burial of the body (not involved here), the expenses and necessary charge made for the care of the deceased, (not involved here), the damages that the homicide caused the property of the deceased, (not involved here), and the support not only of the widow, descendants and ascendants, who were being supported by him, he being under legal obligation to do so, but also the posthumous descendants that he may leave.

The Court will note that the obligation here involved is denominated a support, not "damages exemplary as well as actual." It will aid in arriving at a correct construction of article 319 that reads: "The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judge according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1st, at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; 2nd, when those beneficiaries get married; 3rd, when the minor children become of age; 4th, in any other case in which, according to law, the deceased, if alive, would not be required to continue the support."

These provisions of the law of Mexico define the right. It expressly declares it to be an obligation to support, not to "pay damages in such sum as a jury may think porportioned to the injury resulting from such death" as under our laws. Not only is it

an obligation to give support, but it declares that such obligation "shall last during all the time that the deceased might have lived if the homicide had not killed him, to be calculated by the Judge according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide." The obligation to give support by this same statute, declares that the obligation shall cease: "1st. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it." This is a limitation upon the right of survivors to a support, or to damages growing out of the wrongful killing. It excludes the theory that a judgment in *solidium* can be given in the enforcement of the right secured. This is the natural construction of this statute that must be conceded to govern and fix the right of the survivors, wife and children to a support. Especially is this construction the natural result when considered in connection with the three remaining provisions expressly declared to be a limitation upon the right secured. They are: 1, when those beneficiaries get married; 2, when the minor children become of age; 3, in any other case in which, according to law, the deceased, if alive, would not be required to continue the support. This statute of Mexico evidently does not contemplate the giving a sum larger or smaller at once, said sum to be ascertained by the Court or jury, as provided by Art. 3027 R. S. of Texas. Art. 3027 reads: "The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." The want of analogy between our law and those of Mexico, relating to the right, is apparent. The dissimilarity between these rights is so manifest, that we would not discuss them were it not that the trial Court and eminent counsel for defendants in errors assert that the right secured under the Mexican laws pled, is substantially the same as the right secured to the survivors under the statutes of Texas. If the language of the Mex-

ican statute be given its natural construction, according to the English thereof admitted to be correct, then it means that a surviving wife and children of one wrongfully killed by another, is entitled to a support which support will be discontinued whenever it shall become unnecessary, when the widow and daughters marry, and when the children become of age. This secures a right that in the nature of our Courts, a court of law cannot take jurisdiction of or enforce by a judgment. To give this Mexican statute a construction that harmonizes its provisions as to the right secured with the laws of Texas, every known rule of construction both of law and grammar, must be disregarded. The original statute is in the Spanish language, translations are admitted to be true and correct as pled by the defendants in error, and in construing these laws we must adopt the rules of construction that "words in common use are to be taken in their natural, plain, obvious and ordinary signification." This fundamental rule must be done violence or these provisious create a right unknown to our laws and which our courts are wholly incompetent to enforce, because the process, judgment and proceedings known to our courts are not adapted to give such relief or enforce such rights.

The Court will note that we do not in this presentation question the able opinion of this Court in the case of Evey vs. Mexican Central Ry. Co., but we submit that the case at bar is clearly distinguishable from the Evey case. In the Evey case this Court construed the statutes or laws of Mexico, as to the right secured to persons in Mexico on account of personal injuries wrongfully committed, a purely transitory action at Common Law. The wrong in that case was committed by a citizen of the United States operating a railroad in Mexico to a citizen of Texas and of the United States under a contract of employment made in Texas. In the case at bar this Court is called upon to enforce a right that had no existence at Common Law, but that absolutely depends upon the right defined and fixed by a foreign law, to wit, the law

of Mexico more than once quoted in this brief. It is indisputable that in the character of cases at bar the cause of action having occurred in a foreign country, the right and liabilities of the parties and their extent are governed by the laws of such foreign country. The right secured to surviving wives and children under the laws of Mexico is in the nature of alimony or pension and does not contemplate the giving of a smaller or greater sum at once. The broad and liberal rule announced by Justice Miller in Dennick vs. Ry., 103 U. S. 11, "that wherever, by either the Common Law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties," cannot be successfully invoked in the case at bar. The right is not such a right, as our Courts are adapted to enforce, and therefore it has no legal jurisdiction over such matters. The right secured is such a right as may be denominated civil and equitable. The United States Circuit Courts on the law side have no such jurisdiction, power or authority. In Dennick vs. Ry., supra, the right of action accrued under the law of New Jersey. It was such a fixed right, not inconsistent with the laws of New York and one that could, without doing violence to the laws of New Jersey, be enforced by the Courts of New York. Is the right secured to the defendants in error, as survivors of W. H. Slater, under the laws of Mexico, one that the Courts of this country can enforce by judgment? This must be answered in the negative, or the limitations fixed in the right by the same laws must be disregarded. In a number of states of the United States, statutes giving a right of action to certain representatives of deceased persons wrongfully killed, or for injuries resulting in death, have prescribed limitations as to amounts; and no Court, either Federal or State, in suits brought in another jurisdiction, has ever ignored such limitations. The statutes of Illinois limit the recovery of widows, children or next of kin to $5,000.00. In Morris Adm'r vs. Chicago R. I. & P. R. R. Co., 19 Am. & Eng. Ry. Cases 180, the Court of

Iowa took jurisdiction, but gave effect to the limitations fixed by the Illinois statute, the place where the cause of action occured. In another class of cases the same principle is enforced. An administrator under the laws of Missouri is prohibited from instituting, maintaining or prosecuting an action for damages resulting from the wrongful act or omission of another in causing death of his intestate. The Supreme Court of Kansas, 19 Am. & Eng. Ry. Cases 184, holds that an administrator appointed under this Missouri law cannot prosecute such a suit in Kansas, and because he could not do so in Missouri, the state of his appointment.

We submit that our 1st. and 2nd errors are well taken and that this Court should reverse and dismiss this case.

Our 3rd error involves the same questions of law, and we submit that the same is well taken and that this cause should be reversed and dismissed.

Our 5th error is in substance that the Court erred in not instructing a verdict for defendant, the plaintiff in error. We submit that for reasons given under our first three errors, this error is well taken and that the case should be reversed and dismissed.

Our 6th, 7th and 8th errors involve questions so intimately related to each other as to justify their submission together.

Our 6th error is, that the Court erred in refusing to give in charge to the jury defendants special charge in words as follows: "The jury are instructed that William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering into service of defendant, assumed all the risks ordinarily incident to said service, and in this connection you are instructed that the risks assumed by him include all open and visible defects. And if you believe from the evidence that said W. H. Slater was injured while undertaking to remove a pinched pin and link, or pin or link, with

knowledge of their conditions upon a moving car, then in that event you will find for defendant." See Bill of Exceptions No. 6. (Trs. pp. 65 to 71.)

Our 7th error is, that the Court erred in refusing to give in charge the following special instruction: "The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was injured and killed by reason of the fact that the drawheads of the cars to be coupled together were of uneven height, and that such condition was known to William H. Slater, and that he, the said W. H. Slater, was careless, or that he, the said Slater, in trying to couple the said cars failed to use that degree of care and caution usually adopted by a prudent person in the performance of said service, then in that event he was guilty of contributory negligence, and you will find for the defendant."

Our 8th error is, that the Court erred in refusing to give in charge the following special instruction: "The jury are instructed that if they believe from the evidence that W. H. Slater, for whose injury and death plaintiff sue, was attempting to couple two cars together, and that said drawheads of both cars had in them pinched pins and links, and that physical condition was known to said William H. Slater, and that in attempting to make such coupling under such conditions was inconsistent with that ordinary care and prudence that would be used by an ordinarily prudent man under similar circumstances, then you will find for defendant."

We submit that when a person enters the service of another he assumes all the ordinary hazards incident to the service to be performed. And this includes all risks which are open to common observation. Union Pacific Ry., vs. Daniels, 152 U. S. 688; M. P. Ry., vs. Somers, 78 T. 441; T. P. Ry., Geiger, 79 T. 19; G. C. & S. F. Ry., Co , vs. Brentford, 79 T. 625; St. L. A. & T. Ry., vs. Lemon, 83 T. 146; G. C. & S. F. Py., Co., vs. Schwable,

1 T. C. A. 577; Railway vs. Ringle, 9 T. C. A. 322; Ely vs. S. A. & A. P. Ry., Co., 15 T. C. A. 511.

The questions here involved is, did the Court err in refusing to give the special charges? If the main charge of the Court as applied to the facts cover the point or principle, then there is no just complaint, otherwise it is a fatal error and demands a reversal. It, therefore, becomes important to first consider the charge of the Court as given, in so far as it relates to the question involved as applied to the undisputed facts in evidence.

The Court instructed the jury: "That it was the duty of the defendant to furnish deceased, William H. Slater, cars which enter into the make up of the train about which he was engaged, having drawheads of the same height, so that their centers would be opposite to each other and you will determine from a consideration of the testimony whether the cars about which deceased was working at the time of his injuries, were constructed in accordance with the requirements (of) Mexican Law. If such cars were constructed, in reference to their drawheads, as required by the Mexican statute, then plaintiffs would not be entitled to recover in this case. You are further instructed that although the cars in question were defectively constructed, that is to say, that although they did not meet the requirements of the Mexican Law in reference to the adjustment of their drawheads, that fact alone would not render defendant liable to damages to plaintiffs, and you would still have the further question to determine, whether the injuries of the deceased were the direct result of such defective cars. Hence to authorize a verdict in favor of plaintiffs, you must be satisfied from the testimony: 1, that the cars in reference to the drawheads, were not constructed according to the requirements of the Mexican Law; and 2nd, the injuries of the deceased resulted directly from such defective construction.

"It is insisted by the defendant that the deceased was guilty of negligence which contributed to the injuries resulting in his

death and on that account plaintiffs are not entitled to recover. In reference to this point, you are instructed that the law required the deceased to look out for his own safety, in order that harm should not come to him in the discharge of his duties. If, then, while performing his duties as brakeman, he failed to excercise that degree of care and caution, which a person of ordinary prudence would usually exercirse under similar circumstances, and if from such a want of care his injuries resulted, the plaintiffs would not be entitled to recover in this suit. And you are further instructed that if in coupling the cars in question at the time deceased was hurt was dangerous, and the deceased knew of the danger incident to the business, and notwithstanding attempted to couple the cars and was hurt in the attempt, in such a case the plaintiffs would be debarred of a recovery. The question on the one hand, as to the construction of the cars and adjustment of drawheads, and, on the other hand, as to the negligence of deceased is submitted solely to your determination, and you will solve it to your satisfaction from a consideration of all the facts and circumstances in evidence." (Trs. pp. 67 & 68). Defendant's Bill of Exceptions No. 6.

The facts are undisputed that W. H. Slater, the deceased, was injured and killed while attempting to couple two of defendant's cars. That the drawheads of said cars were of an uneven height. That deceased knew the said cars were of an uneven height; that both of said cars had in them pinched links and pins; that deceased knew the pins and links were pinched, but he said that he could get them out; that he boarded the moving car as it was approaching the other car; the testimony or facts conflict as to the position Slater was in as the cars came together, and as he attempted to make the coupling. One or more witnesses say that he walked in between the cars as they came together to make the coupling. The others say that he was sitting on the beam of the moving car trying to remove the pinched link and pin, when he was injured. The proper manner to make such a coupling was to

step in side ways, as the cars came together. Slater had one thigh crushed and broke and the other slightly mashed; and if he had been standing on the ground he would have been caught across the hips. See evidence of Galbraith, Lattig, Pedraza and Spencer (Trs. pp. 51 to 62). Defendant's Bill of Exceptions No. 5.

Under these three errors that go to the Court's refusal to give our special charges, we submit that it is always error to refuse to give a charge that is applicable to each statate of facts which the evidence tends to establish, pro and con; and that a special request so framed should be given, unless the charges already given fully cover the same law as applied to the facts. Jacobs vs. Lotty, 76 T. 348.

The Court's charge as given is absolutely silent as to the risks assumed by the deceased in reference to his knowledge of the defect in reference to the pinched pins and links. The charges requested covered these defects in the Court's main charge, and are in every particular applicable to the facts established by the evidence. There is absolutely no reference in the Court's charge given to the conditions existing by reason of the pinched links and pins, and the jury was therefore justified in ignoring the view of defendant's defense based upon the deceased's knowledge of such condition. The charge refused as contained in our 8th error sharply presents this defense, and with all fairness to the plaintiffs. We submit that these charges should have been given and that the Court's refusal to give them was error, in that it virtually ignored a part of the facts relied upon to establish negligence on part of the deceased that contributed to his injury. Specially is this error manifest under the laws of Mexico as we prosposed to prove by Emilio Velasco, a person skilled and learned in the laws of Mexico and whose evidence the Court rejected. (Trs. pp. 40 and 41.) This evidence is: "In case the injured party has contributed to the deed or fault or negligence or to the omissions which caused the injury, he is co-author of the offense or fault and his representatives cannot recover. That the wife and chil-

dren have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury or if he contributed in any way with his fault, negligence or omission to the accident." This testimony was rejected but it was clearly not subject to the exception, as it gives a rule of right in Mexico not provided for in the statutes read in evidence.

Our 9th error is, that the Court erred in refusing to give in charge to the jury defendant's special instruction as follows: "The jury are instructed that in the event you find in favor of plaintiffs then you will by your verdict find: first, what sum of money, if any, the said William H. Slater, at time of his death, was contributing toward the support of his wife and his said children (plaintiffs in this suit) per month, specifying the amount in dollars and cents; second, you will find what proposition of said sum was contributed by said William H. Slater to the said Lena M. Slater and what proportion to each of the minor children and in this connection you are instructed that the said sum in the aggregate must not exceed the sum of money he contributed to their support during his, W. H. Slater's life and at and before his death."

This charge was dratted specially to cover the measure of plaintiffs' rights as survivors of W. H. Slater under the Mexican Laws, that we have heretofore shown govern the measure of plaintiff's recovery, granting that it involves such a right as the Courts of Texas, either State or Federal can administer. Arts. 318 and 319 of the Mexican Laws, transcript pages 6 and 7, fix the right and its extent of plaintiffs and the charge requested was evidently sufficiently suggestive to the Court as to the proper measure of damages under the Mexican Laws, whether in all particulars full enough. It should have been given as requested, or at least given modified as the Court thought necessary. It, as

requested, was notice to the Court that its charge upon the subject was objected to. See Earl vs. Thomas, 14 Texas 592; Kirby vs. Estill, 75 T. 488; Railway vs. Hodges, 76 T. 93; Freyby vs. Tierman, 76 T. 291.

Our 10th error is, that the Court erred in charging the jury as follows: "The damages then must be measured by the pecuniary —money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, or for physical or mental sufferings which the deceased himself may have endured. If he had been simply injured and not killed and brought suit himself, the rule would have been otherwise, for in that case the law would permit him to recover, if entitled to recover at all, damages for physical and mental pain. But in cases of this kind damages, as before stated, must be measured by the pecuniary standard, that is, the money value of the life of the deceesed to the surviving wife and children, and the jury, acting upon their sound and deliberate judgment, based upon the facts and circumstances in evidence, and their own knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of deceased." See 75 Tex. 67-69.

This charge is erroneous in that it in so far as it can be said to announce a rule of law, gives a measure of damages applicable to the laws of Texas and of the United States, and not the law of Mexico, applicable to the case made.

The Court will note that this charge was not specifically excepted to, but it was inferentially excepted to by the request refused in our 8th error. Bill of Exception No. 7. (Trs. pp. 71 to 73.)

The rule announced by the Supreme Court in Tucker vs. United States 151 U. S. 170 and in St Clair vs. United States,

154 U. S. 134-153 and in Humes vs. U. S., 170 U. 210, 213, has no application here, because that rule is based upon the theory that the Court gave no erroneous instructions. Our Bill of Exception No. 7, (Trs. pp. 71-73), is not confined to that particular part of the record, but this Court will, in cases where the error is apparent upon any part of the record, review same whether it is found in the bill or not. Suydam vs. Williamson 20 How 427.

We submit that the chrge is subject to the error and that this Court should reverse the case.

Our main contention is that the record in this case disclose a system of laws governing the rights of the parties, that the Courts of Texas or the Courts of the United States have no jurisdiction to enforce. That the Circuit Courts of the United States in the exercise of their Common Law jurisdiction, cannot enforce any right not capable of being enforced by a judgment that shall be final and conclusive between the parties.

The case at bar being in favor of the surviving wife and children for recovery of damages resulting to them by reason of the iujury and death of deceased, is the assertion of a right that does not survice at Common Law. The right, therefore, must be determine by the *lex loci*, and not by the *lex fori*. The accident having occurred in Mexico, it was necessary for the plaintiffs to plead the laws of Mexico, because those laws determine the right of plaintiffs and their extent. This principle is so well established that we deem it unnecessary to cite authority.

The uniform tenor of the decisions of the Supreme Court of Texas, is that rights acquired in foreign jurisdictions depend for their validity, nature and extent upon the laws of the place where they occurred, and that when pleaded and proved such laws will be regarded as the rule of decision. Crosby vs. Huston, 1 Texas 203; Andrews vs. Hoxie, 5 T. 171; Willard vs. Condint, 10 T. 213; Sadler vs. Anderson 17 T. 245; Bradshaw vs. Mayfield 18 T. 21;

Powell vs. De Blam, 23 T. 66; James vs. James 81 T. 373, 381: Prochiller Bronson 50 T. 361. This same principle prevails in the United States Circuit Courts. See Railroad Co., vs. Babcock, 154 U. S. 190, where the Supreme Court by Justice White in discussing a similar question says, "the statutes of another State have, of course, no extraterritorial force, but rights acquired under it will always in comity be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, *will govern as to the right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the State where the action is brought." The Supreme Court of Ohio, in the case of Alexander vs. Penna Co., 30 N. E. 69 in a suit for damages for personal injuries sustained in Pennsylvania where the contract was made and to be performed, say in Ohio the plaintiff was not the fellow servant of the "gang boss" whose alleged negligence caused the injury, while under the Pennsylvania decisions pleaded and proved by defendant, they were fellow servants, held that plaintiff could not recover. In other words, the law of Pennsylvania was held to fix the right and the limitations thereof. In our research through the dicisions of the United States Supreme Court we have found no case holding a contrary doctrine. This is the rule of decision in the States of Alabama, Mississippi, Tennessee and Georgia. In fact in every State we have investigated. The cases decided by this Court, Evey et. al vs. Mexican Central Ry. Co., do not announce any principle inconsistent with our contention in this case. If the right secured to defendants in error is one this Court cannot enforce, then our demurrers were well taken, and should have been sustained. If however the demurrers were properly overruled, then the right and measure of recovery must conform to the laws of Mexico, and not to the laws of Texas. See Authorities cited.

In conclusion we submit that this Court should reverse and

dismiss this suit, or reverse and remand with instructions to the Court to try the case according to the Mexican laws.

BRIEF AND ARGUMENT IN REPLY TO PETITIONERS PETITION FOR CERTIORARI, BRIEF, ETC., AND IN SUPPORT OF THE DECISION AND OPINION OF THE CIRCUIT COURT OF APPEALS.

This Court will note that the respondent, the Mexican National Railroad Company assigned ten separate and distinct errors to the judgment and proceedings in the trial court. Of these errors the Hon. Circuit Court of Appeals on writ of error practically sustains the first, second, third and fourth, failing to discuss or dispose of the fifth, sixth, seventh, eight, ninth and tenth errors for the reason that their consideration was unnecessary in view of the conclusions reached in the consideration of the first four errors assigned. While we confidently submit that the disposition of the Hon. Circuit Court of Appeals is correct, we do not desire to be understood as waiving any of the errors assigned.

The first question arising upon the record in this Court, is; has this Court jurisdiction to revise and review the decisions and judgments of the Circuit Court of Appeals in the class of cases to which this case belongs?

The jurisdiction of the Circuit Court as shown by petitioners original petition record page 2, depends wholly upon diverse citizenship of plaintiffs and defendant.

The 6th section of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." In so far as pertinent to the questions here involved, reads: "And the judgments and decrees of the

Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This Court through the Chief Justice in the case of Benjamin vs. City of New Orleans, 169 U. S. 161 to 164, upon a similar question say: "But the jurisdiction was none the less dependent on diverse citizenship as between complainant and defendant because it might be defeated if complainant did not bring himself within the restrictions. The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the 6th section in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also, separate and different grounds in respect of one or more of several parties. We think the case within the intent and meaning of that section, clearly belongs to the class in which the judgments and decrees of the Circuit Court of Appeals are made final."

Justice Gray speaking for this Court in the Press Publishing Company vs. Monroe, 164 U. S. pages 105-106, says, in the concluding paragraph of the opinion that, "the jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the Circuit Court of Appeals was final."

This Court in the case of Borgemeyer vs. Idler, 159 U. S. 408-415, held to the sameeffect and the same doctrine is announced in a number of cases not necessary to cite. We submit

under these decisions of this court that this case is clearly within the class of cases wherein the judgments and decrees of the Circuit Courts is final, and that this Court therefore has no jurisdiction to revise the decision of the Circuit Court of Appeals in the case at bar.

There are various reasons why, as the representative of the respondant, the plaintiff in error in the Circuit Court of Appeals, we would be pleased to have this Courts opinion upon the questions raised by our several assignments, but strong as these reasons are, we have not felt that we could, with justice to our client, or this Court, do less than suggest the want of jurisdiction in this Court, to revise the decision and judgment of the Circuit Court of Appeals in the case at bar.

If this Court in its wisdom shall be of opinion that it has jurisdiction to review the decision of the Circuit Court of Appeals in the case at bar, then we submit 1st: That the disposition of the case by the Circuit Court of Appeals is correct, and that the judgment of said Circuit Court of Appeals should be affirmed by this Court.

The Circuit Court of Appeals speaking through Justice McCormick, Circuit Judge in the disposition made, first considers the questions raised by the 4th. error assigned, and decides that the trial court erred in sustaining petitioners objections to the reading in evidence the depositions of one Emilio Velasco, a man learned in the laws of Mexico, duly verified and authenticated and returned into Court. (Record pages 93-97).

Our contention in support of our 4th. error was, that the action of the Circuit Court in rejecting the testimony of this witness was erroneous in that it assumed that the statutory law of Mexico is all of the law in cases of the character of the suit at bar affecting the right of recovery. Second: That it assumes that it is incompetent to offer testimony of one learned in the laws of a

foreign tongue and country, as to what the law is, whether written or unwritten; and third: That it assumes that it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute in a foreign tongue and country. (See page 16 of this brief, and authorities cited). The learned Circuit Judge in giving voice to the views of the Circuit Court of Appeals upon our 4th. error, beginning on page 92 of the record, states in substance the statue laws of Mexico, and the difficulties attending their proper construction, citing in addition to the authorities cited in this brief page 16 Story on Conflict of Law, Secs. 557, 558 and 563, Record page 95, concluding his able opinion upon our 4th. error by holding that the learned trial judge erred in sustaining the objection to the introduction of this proof. And further holding that for reasons stated in the discussion, they would take judicial notice of the testimony thus rejected by the trial judge, upon their consideration of the Writ of Error.

The petitioners complain of the able opinion of the Hon. Circuit Court of Appeals touching our 4th. error, in their petition for a rehearing. First. "Because the testimony of Emilio Velasco does not show what construction the Courts of Mexico place upon the Statutes of that country, but is only in substance a reiteration of the Statute law of that Country as pleaded, together with a statement on his part that the right of plaintiff is in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court, and a further statement as to when the obligation to furnish alimony ceases. 2nd. Because the Court in considering the testimony of Emilio Velasco and giving such weight thereto, in the opinion of the Court, as should have been given to it on the trial, that deprives plaintiff of a valuable right, viz: to impeach, attack or rebut the same by the testimony of others eminent and learned in the laws of Mexico, and in preventing plaintiffs from showing, if such be a fact, that the judgment of Mr. Velasco may have been unduly, but honestly inclined to the interest of a client, and because the Court impro-

perly attached such consideration to the evidence of Mr. Velasco as would be accorded to the decisions of the Courts of Mexico." (See Record Pages 74 & 75).

In their petition to this Court for a Writ of Certiorari petitioners allege "that the Circuit Court of Appeals has erred in giving a construction to the laws of Mexico suggested by the statements contained in a deposition taken in the case, but which was not admitted on trial, and thus were your petitioners deprived of an important and valuable right, viz: To meet such testimony by evidence in rebuttal, and the statements so considered lead to an unreasonable construction of the laws of Mexico, not shown to be the construction placed upon those laws by the Courts of that country."

Petitioners in their brief (page 24) submit their proposition No. 5, touching the subject of our 4th. error in words as follows:

"The exclusion of the testimony of Emilio Velasco, if error, was not perjudicial–the testimony was merely acumulative; and wherein it was a mere opinion and did not show how the Courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissible."

The able counsel representing petitioners fail as this Court will note, to cite any authority, whatever, in support of their proposition; nor do they cite authority or give any reason why the Circuit Court of Appeals erred in concluding that the learned trial judge erred in sustaining the petitioners objection to the introduction of the testimony of Emilio Velasco, taken by deposition, duly verified and authenticated and returned into Court; nor do they cite authority, or state a well founded reason why the Circuit Court of Appeals erred in taking judicial notice of this testimony of one learned in the laws of Mexico, in arriving at a proper construction of the laws of Mexico plead.

Counsel for petitioners content themselves, under head of remarks page 25 of their brief in support of this fifth proposition by saying:

"Notwithstanding the exclusion of the testimony of the witness, the Honorable Circuit Court of Appeals gave it all consideration, as if it were all the evidence available." This language does an injustice to the able jurist speaking for the Circuit Court of Appeals. Justice McCormick says, on page 96 of the record, "*Without the aid of this testimony,* (referring to Velasco's evidence) *we would find it difficult to construe the limitations expressed in the latter part of article 319, above quoted, and especially the second one of those limitation; and while we probably would from the nature of the case and from a careful consideration of the statute pleaded and proved, have reached the conclusion that limitation 2, etc., etc.,* we should have felt the need of further proof which is offered to be suplied by the deposition of the learned lawyer." This language used by the able jurist hardly justifies the assertion of counsel, that the Circuit Court of Appeals "gave it all consideration as if it were all the evidence available." Counsel further beg the question in saying: "it might be shown by other distinguished lawyers of Mexico, that in some of the States of Mexico alimony, of which Mr. Velasco speaks, is recoverable either at stated periods or in one fixed amount."

This statement does counsel for petitioners an injustice, in this, that it must be presumed by this Court, that they had the right, or that they waived the right to cross-examine the witness, and thus establish, if a fact, that "alimony is recoverable either at stated periods, or in one fixed amount. It does counsel and injustice, in this, that their remark does palpable injustice to the witness, in this, that witness nowhere testifies that it is alimony, but upon the contrary, the witness swears that the right secured to a surviving wife and children "is in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court; that obligation to pay alimony to the wife and

children does not imply that of giving a sum larger or smaller at once, but of giving a pension." Counsel further remarks "had the trial court admitted the testimony of Mr. Velasco, the adverse party would have been accorded the right to offer testimony in rebuttal. (Nobody disputes this statement). If the foreign law cannot be established by evidence like any other fact, the right of parties to adduce evidence of the fact to be established should not be cut off by closing the door against them." Counsel do themselves palpable injustice in that it implies their total ignorance of the elementary rule governing the manner of establishing foreign laws "that no court takes judicial notice of the laws of a foreign country but they must be proved as facts, and that the better opinion seems to be, that this proof must be made to the Court, rather than to the jury." Greenleaf on Ev. Sec. 486.

This rule has been time and again approved by this the highest Judicial tribunal on earth. The decisions of the Circuit Court of Appeals deprives petitioners of no rights not clearly attributable to their own neglect, or their own over-confidence in their position "that the statutory law of Mexico as pleaded, is best proved by the Statutes themselves," and if mistaken in their position, this Court cannot, and will not excuse such negligence. Courts from time whereof the memory of man runneth not to the contrary, have, always, in construing foreign laws, especially those conceived and expressed in a foreign tongue and language, had resort to testimony of witnesses having knowledge of such laws and idioms pertaining to the language in which such laws are couched or worded.

All human experience verifies the doctrine announced by Story that "no tribunal on earth, however, learned, could hope by any degree of diligence to master the laws and proceeses and remedies of all other nations and the qualifications and limitations belonging thereto."

Petitioners in their original petition filed in the Circuit Court

plead the statute laws of Mexico as the basis of their right thus recognizing the well established elementary rule that "in regard to the merits and rights involved in actions, the law of the place where they originated is to govern."

This rule has been approved by this Court from the date of its organization and may therefore be treated as established.

Again we submit that the consideration of the evidence of Mr. Velasco, if error at all, was not prejudicial to the rights of petitioners, because it is distinctly announced by the learned judge speaking for the Circuit Court of Appeals that *they probably would from the nature of the case, and from a careful consideration of the statute pleaded have reached the conclusion* announced.

We further submit that, independent of the evidence of Mr. Velasco, the construction given the statute of Mexico pleaded by petitioners by the Circuit Court of Appeals, is the only reasonable and rational construction of the said statutes.

It is therefore proper that we, in discussing this branch of the case, consider the statutes plead, and for this purpose, we group the statutes having reference to the right secured. 1st. Art. 301, Penal Code, Book 2, reads: "The civil liability arising from an act or omission contrary to a penal law, consists in the obligation imposed on the party liable to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses. Art. 304. reads: Reparation comprehends payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must cause a proximate and inexcusable consequence. Arts. 305 and 306 cannot possibly aid us in arriving at a conclusion as to the nature of the right secured

to petitioners by reason of the homicide of husband and father, and we therefore omit them from this group.

Art. 307 refers to judicial expenses and we therefore omit same.

Art. 308 provides that civil responsibility cannot be declared except at instance of the party entitled to recover Art. 309 refers to duties of judges, what laws to be considered, etc., and may therefore be omitted as applying strictly to the remedy as contradistinguished from the right secured.

Art. 310 refers to the rights of the injured person, etc., and may be omitted. Art. 311 reads: The action to enforce civil responsibility demanding support of a person quilty of homicide is personal and belongs exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action form no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offence in life. Art. 318 reads: The civil responsibility that grows out of a homicide done without right, (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, *and the support not only of the widow descendants and ascendants of the deceased who were being supported by him, he being under legal obligation to do so, but also to the posthumous descenadants that he may leave.*

Art. 320 reads: In order to fix the amount which should be given as the *measure of support,* the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it. (Record page 5 and 6.)

The learned judge speaking for the Circuit Court of Appeals construing statutes of Mexico, plead by petitioners, says "It ap-

pears clear to us from a careful comparison of the different sections of the statutes, and a careful consideration of the depositions of the Mexican lawyer that, the right created by the Mexican Laws, is the right to a continuing support during the periods of time that support would have been due from deceased, and in the amount that it would have been due proportioned to his ability to give it and the necessities of those who had a right to receive."

Now if the deposition of the witness be eliminated, and not considered, is it possible, consistent with any known rule of construction of statute law, to say that these statutes do not create "the right to a continuing support during periods of time that support would have been due from the deceased, and in the amount that it would have been due, proportioned to his ability to give it and the necessities of those who had the right to receive it?" If not, it follows as a necessary sequence that the consideration of the deposition of the learned Mexican lawyer, by the Circuit Court of Appeals, was not prejudicial to the rights of petitioners.

The consideration of the evidence of Mr. Velasco, by the Circuit Court of Appeals, was proper, notwithstanding its rejection in the Circuit or trial court, because the rule as laid down by our ablest authors is, 1st. that all matters of law are properly referable to the Court, and 2nd. that the object of the proof of foreign laws is to enable the Court to instruct the jury what in point of law, is the result of the foreign law to be applied to the matters in controversy before them. Greenleaf Ev. Sec. 486. Story on Conft. of laws, Sec. 638.

The testimony of one learned in the laws of a foreing country, when offerred, stands, as any other evidence, whether it be statute, or decisions of a foreign country. If the testimony had been a statute or an authenticated decision, rejected, it is evident that notwithstanding its rejection, by the trial court, that an

appellate tribunal in reviewing the decisions of the lower court could properly consider the rejected evidence, or suppose such testimony had been admitted in the trial court, the appellate court could very properly, as is often done, give to it weight and influence not given it in the trial court.

In conclusion of this question, we beg to suggest that petitioners in their brief, p. 24, seem to waive or abandon the grounds insisted upon in their petition for are hearing in the Circuit Court of Appeals, and as insisted in their petition, p. 6, to this Court for a Certiorari. In their brief and only proposition touching the depositions of Mr. Velasco, they say "its exclusion if error, was not prejudicial–the testimony was cumulative; and wherein it was a mere opinion and did not show how the courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissable."

This proposition duel in form, states no reason, whatever, why the Circuit Court of appeals erred in resorting to the testimony of Velasco to aid in the construction of the statutes of Mexico. The fact that this learned lawyer cited no decisions of the Courts of Mexico construing the laws of that country applicable to the issues raised in this suit, goes to the weight to be given such evidence, rather than to its admissibility and consideration. Under such condition of the record, should not this Court treat the objections as waived by petitioners? If not, then we submit that the Circuit Court of Appeals was clearly right in holding that the trial court erred in rejecting the evidence of Velasco, and in giving to it consideration in arriving at a proper construction of the statutes plead.

It is proper that we, in this connection, call this Court, attention to a manifest error of petitioners counsel in their statement of the agreement between the parties, page 16 and 25 of their brief. It is stated that "it was agreed that the translations of the laws of Mexico, pleaded by plaintiff's and defendant were correct,

and are the laws of Mexico having application to this case." This statement is incorrect and misleading, and we assume that counsel in so citing the agreement, were innocently mistaken. The agreement actually made, reads: It is agreed by counsel upon both sides that the translations of the laws of Mexico, as set out in plaintiff's petition, and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned."

The Court will note that there is nothing so far that they "are the laws of Mexico having application to this case."

"And it is further agreed that the laws described in defendant's original answer, and plaintiff's supplemental petition are the laws of Mexico having application to this case." (Record page 19.) This agreement has reference to laws of Mexico described in defendant's answer record page 15, and to certain laws of Mexico attached to and forming part of petitioners first supplemental petition. Record p. p. 16, 17, 18 & 19.

It was not intended by this agreement to say that the laws plead by petitioners in their original petition, record p. p. 2 to 11, as a basis of their cause, had no application, or that they were the law having application, or that the laws described by defendant in its original answer, and by petitioners in their first supplemental petition, are the laws having application to this case.

It was simply meant and so treated in the trial court, as well as in the Circuit Court of Appeals, that these laws described in defendant's answer, and in plaintiff's first supplemental petition, were the laws having application to the defense set up by defendant, Recod p. 15.

We come now to the consideration of the final judgment and conclusions reached by the Circuit Court of Appeals in its

disposition of the case. The learned Judge concludes his able opinion as follows. "We therefore conclude that the right of survivors (plaintiffs) to recover damages for personal injuries resulting in the death of William Slater is alimony or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is therefore so dissimilar from the laws of Texas, and the common law, that the Circuit Court in an action at law cannot administer the same and enforce the rights of plaintiffs so as to do substantial justice between the parties" Record p. 98. The Circuit Court of Appeals upon the above conclusion reversed the judgment of the Circuit Court, and remanded the cause with directions to that Court to sustain special exception No. 2 filed by defendant on March 18th, 1901, and to dismiss the plaintiffs case. Record p. 98.

The Court will note that the Circuit Court of Appeals holds that the Circuit or trial court erred in overruling defendant's speciol exception numbered 2, filed March 18th, 1901 Record p. 14, and which reads: 2nd. "Defendant excepting further, says: that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death, is alimony or pension, payable in installments, and is therefore, so dissimilar from the laws of Texas, and of the common law, that this Court cannot administer or enforce said laws and rights."

The trial judge overruled the above special demurrer, to which defendant excepted, and saved its bill of Exceptions, Record p. 33 & 34 to the action of the Circuit Court in overruling defendant's exception No. 2 filled March 18th, 1901. Defendant's assigned, error, Record p. 66.

The same question involved in our 2nd. assigned error, and which was sustained by the Circuit Court of Appeals, was substantially involved in our first and third assigned errors. Our first

error went to the action of the Circuit Court in overruling our general and special demurrers, filed Dec. 4th, 1900 to plaintiffs original petition, Record page 12. Our third error went to the action of the trial court in sustaining plaintiffs exception (Record p. 16) to defendant's answer, filed March 18th, 1901 (Record pages 14 & 15). Our 1, 2 and 3 errors were in our original brief. (See p. p. of this brief), submitted together, because as conceived they all referred to same subject. In view of the conclusions reached by the Circuit Court of Appeals, and the disposition made by that Court, it became unnecessary to discuss our 1st. and 3rd. errors, except incidently in reaching a decision.

The main question, or rather controlling question presented by the reeord, is can the Circuit Courts of the United States consistently with their own forms, of procedure and law of trials, take jurisdiction of, and administer the laws of Mexico in the class of cases to which this case belongs, and do substantial justice between the parties plaintiff's and defendant giving to the plaintiffs the rights secured by the laws of Mexico, and at the same time secure to defendant its rights under that law?

If that cannot be done, then it follows, according to all the adjudicated cases, that the Circuit Courts should decline jurisdiction, or rather refuse to assume the power and responsibility of undertaking to administer such laws. See Huntington vs. Attrill, 146 U. S. 657-689 where this Court cites with approval, Higgins vs. Central New England R. Co. 155 Mass. 180, and which is cited by the learned judge speaking for the Circuit Court of Appeals in his opinion in the case at bar.

The question is one for the determination of the Sovereign appealed to, to enforce such foreign law. The fact one Sovereign power may refuse to assume such responsibility, can only be invoked before another sovereign because of the soundness of the reasons given for such refusal. One Sovereign may decline such

jurisdiction or responsibility for reasons another Severeign might deem not well taken.

The question as to the enforcement of foreign laws by the different States of the United States, has generally arisen out of resorts to the Courts of one of the States to enforce the laws of a sister State of our union of States. And in every instance, each State as a sovereign, has for itself, according to its own discretion of a sound public policy, decided whether it would take jurisdiction or decline to do so. In some instances in the history of our Federal Judicature, these courts have refused to follow the rule established by the decisions of the State Courts in which they hold sessions, in the class of cases to which this belongs. It is extremely to be regretted that such differences of decision should ever have arisen between the State Courts and Federal Courts, but these differences never the less do exist, touching what is, and what is not a sound public policy. In Texas, the State whose laws the Circuit Court, in which this cause was brought and tried, hold that they will decline to take jurisdiction, and assume the responsibility of undertaking to administer the laws of Mexico in ordinary personal injury suits. Mexican National R. R. Co. vs. Jackson, 89 Texas, 107. The United States Circuit Court of Appeals for the Fifth Circuit have refused to follow the decisions of the Supreme Court of Texas in that class of cases. Evey vs. Mexican Central Ry. Co. 81 F. R. 294. Mexican Central Ry. Co. vs. Marshall, 91 F. R. 933. We will hereafter have occasion to refer to these decisions at greater length.

It is also a well established rule of decision of the Supreme Court of Texas, to decline to take jurisdiction of claims for personal injuries resulting in death, even where the injuries occur in any of our domestic States or Territories, basing such refusal upon the fact that the Statutes of the States wherein the injuries happened, upon the rights secured, were materially different from the laws of Texas in relation to same subject. Railway vs. McCormick, 71 Texas, 660. Railway vs. Richards, 68 Texas, 375.

The Circuit Court of Appeals for Fifth Circuit, in a case filed in the Circuit Court in and for the Eastern District of Texas, wherein the plaintiff sought to recover for injuries resulting in death in the State of Louisiana, refused to follow the decisions of our State Supreme Court in the case of Railway vs. Richards, 68 Texas, 375.

We have not cited this condition of conflict existing between the State and Federal decisions upon the subject, with a view of undertaking to reconcile them, nor with a view of undertaking to criticize the soundness or unsoundness of either the one or the other; but to emphasize the correctnes of our proposition, that the question, as to whether the Courts shall, take jurisdiction and assume responsibility of administering the laws of a foreign country, is addressed to the sound discretion of the sovereign whose jurisdiction is invoked; and that it does not involve the denying of a legal right by our Courts to a person seeking legal redress.

We shall assume that it is now the accepted doctrine of this Court that the laws of the country where a cause of action originates, will govern in all matters touching the merits and rights secured.

We submit as elementary, so held by this Court from its organization, *that the Circuit Court cannot, in the trial of an action at law, exercise the power of a Court of Equity*, and that in all cases or causes of action in said Courts, the right will not be adjudicated and relief granted, when to do so, the power of a chancellor as contradistinguished from a law court, must be exercised.

Before undertaking to discuss the rights secured to the petitioners as survivors of Wm. H. Slater (the husband and father) under the laws of Mexico, the country where the right originated, we desire to call this Courts attention to a question suggested by petitioners in their original petition for the "Writ of Certiorari"

p. 4, paragraph 9 thereof, but which, so far as their brief and argument shows is abandoned, or rather not insisted upon now in this Court.

We submit, however, that the extensive border between this country and the Republic of Mexico," (the country whose laws this Court is now asked to enforce) coupled with the graphic description of the physical and business conditions existing along its border between the two republics, "does make the question of the proper adjudication of this case, one of gravity and importance, and of international concern."

Petitioners allege that they are citizens of and reside in Webb County, Texas. That defendant is a corporation and a citizen of the State of Colorado, and that it owns and operates a railway from the City of Laredo, Webb County, Texas, to the City of Mexico in the Republic of Mexico, etc. That plaintiff Lena M. Slater is surviving wife of William H. Slater, deceased, and that William F., Jesse R., Annie E and Henry C. Slater are the minor children of plaintiff Lena M. Slater and William H. Slater, deceased. That on the 20th day of May, 1900, and for a long time prior thereto, William H. Slater, deceased, was an employe of defendant as a switchman in the City of Nuevo Laredo, Republic of Mexico, in the yards of said defendant company at said place. Record p. 2. At the time of the filling of the petition (Nov. 17th, 1900) in the Circuit Court it appears that petitioners were "citizens of and residing in Webb County, Texas," but there is nothing in the petition or the record that even tends to show that the deceased in his life was a citizen of Texas, or of the United States-upon the contrary it affirmatively appears that he was on May 20th, 1900 and for a long time prior thereto, had been in the employ of the defendant company, as a switchman in its yards in Nuevo Laredo, Republic of Mexico, and if presumptions may be indulged, it may be and perhaps should be presumed that both he and his family at the time of his injury were citizens of and residing in Mexico.

In so far as the record in this case shows the Mexican National Railroad Company, defendant, owns and operates no railroad east of the eastern margin of the Rio Grande. It in fact, does not, but connects its track with the Texas Mexican Ry. Co. on the eastern margin of the Rio Grande. It therefore follows as a necessary and an inevitable result, that every judgment recovered in the Courts of the United States against defendant and other railroads in Mexico is the imposition of a tax upon the commerce and people of Mexico.

Judgments against railroads in Mexico growing out of personal injuries, whether resulting in death or otherwise, favor of persons or their representatives, who voluntarily seek and obtain employment upon railways in Mexico, must of necessity be taken into account in fixing tariffs or freights and passenger charges. They must therefore ultimately be paid by the people of Mexico, the patrons of such roads. There is no principle of public policy, or of comity between the United States and Republic of Mexico making it a duty of the courts of this country to take jurisdiction of such causes at the instance of person who "choose as a matter of convenience and not of necessity" such forum. Upon the contrary, it occurs to us, that for sound and indisputable diplomatic reasons, as well as for reasons of public policy between two powers so situated as Mexico and this country as represented by petitioners, and as in fact does exist, the necessity for the exercise of such jurisdiction, should be made to depend upon stronger reasons than mere convenience." The laws of Mexico having application to the subject under discussion, as well as civil rights growing out of their crimes act generally, forms a complete, if complex system of laws, fixing the rights of the injured with proper limitations, and other persons, with a view of protecting society generally securing surviving wife and children that support furnished by deceased persons in life. They provide courts for the adjudication of such matters, and even if those laws, upon examination as to the merits and rights, were found not

materially different from the laws of Texas, the courts of this country should not in response to voluntary appeals made as matter of pure convenience, undertake the responsibility of administering such laws, when to do so, is evidently the imposition of a tax upon the people of a neighboring republic.

The Supreme Court of New York, in a case for the recovery of damages for an assault and battery, committed by the Captain of a Brittish vessel, upon the high seas, both being Brittish subjects, in refusing to take jurisdiction of the cause, uses the following pertinent reasoning: that the courts of this country may take cognizance of torts committed on the high seas on board of a foreign vessel, where both parties are foreigners; but I am inclined to think, it must on principles of policy often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as a matter of right, would introduce a principle which might, oftentimes, be attended with manifest disadvantage, and serious injury to our own citizens abroad, as well as to foreigners here. Gardner vs. Thomas 14 John 134. The tort in that case, for assault and battery, was transitory at common law, and involved a right of universal recognition by all the civilized world. Yet for reasons well stated, the Courts of New York refused to exercise jurisdiction and assume the responsibilities that would necessarily have resulted to our own people, as well as those of Brittain.

The reasoning of the able judge speaking for the Supreme Court of New York in above case, while potent and convincing, certainly cannot be considered as strong, as those existing in the case at bar.

In that case no judgment rendered, was liable to create any burden upon the Brittish, not alike resulting to the people of New York.

In the case at bar, the result of any judgment rendered, is to

indirectly, if not directly, impose a tax, not only on the commerce, but upon the people of Mexico, a neighboring republic, with which our government is at perfect peace, not because of any necessity, but in response to a demand made for convenience.

In the New York case, no question of a material difference in construction of laws having application, existed. In the case at bar, the courts to grant any relief, must construe and apply a system of laws fixing the rights not only of a foreign country, but laws conceived by a branch of the latin race, in the Spanish language; a system of laws that must be construed, if correctly construed, with reference to idioms and maxims of that language as understood by that people.

The Supreme Court of Texas, in Mexican National R. R. Co. vs. Jackson, 89 Texas, 107, a case wherein this defendant was plaintiff in error. A suit by Jackson to recover damages for personal injuries sustained by him while in employ of defendant as a brakeman in Mexico say: "that the law of Mexico, under which plaintiffs claim originated, having been pleaded and proved by the defendant, the rights of the parties must be determined by its provisions. *It would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction.* Story Conflict of Laws, 38.

This is a transitory action, and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this State and the government of Mexico, but one for the courts of this State to decide as to whether or not the law, by which the right claimed, must be determined, is such that we can properly and intelligently administer it, with due regard to the rights of the parties.

The decisions of this Court (well maintained by high author-

ity) establish the doctrine that the Courts of this State will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the laws of this state in relation to the same subject." Citing Ry. vs. McCormick, 71 Tex. 660 and Ry. vs. Richards, 68 Tex. 375. The learned judge speaking for the Supreme Court of Texas, then proceeds to say: "Many difficulties would present themselves in an attempt to determine the meaning of the Mexican law and to apply it in giving redress to the parties claiming rights under it*******

We might or might not give the same effect to the language that is given to it by the courts of Mexico. There could be no reasonable certainty that the parties rights would be adjusted here as they would if the case were tried in the courts of that country, which is their right, for it is well settled that if our State undertakes to enforce the law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume the jurisdiction of this class of cases." The learned judge then proceeds to compare some of the provisions of the laws of Mexico, with the laws of Texas, demonstrating most conclusively the want of similarity between the two systems, concluding by calling attention to the provisions in the Mexican laws that provides "should the plaintiff recover from his injuries, to the extent that he would become able to pursue an occupation suitable to his education and social position, the defendant would have the right under that law to have the payment of damages awarded for diminished capacity to earn money reduced by the amount that plaintiff could earn in such employment." In this State, no judgment could be rendered which would secure this right, but the judgment must be entered for all probable future losses; hence the future earnings, no matter how great they might prove to be, could not go to reduce the damages already paid under such judgment as would berendered

in Texas. How this right would be secured in Mexico, we cannot see, unless payments were required by the judgment to be made in installments, or that future inability to earn money not being considered upon the first trial, the matter would be settled in subsequent suits to recover for such damages. In any event it is a right of the defendant which no court of this State can secure by its judgment."

The laws of Mexico in the above case were plead and proved by the defendant, and that such statute law created the right, and that such laws were so dissimilar to the laws of Texas, that those courts should decline to entertain jurisdiction and assume the responsibility of administering such laws.

The laws plead in that case were the same laws plead by plaintiff in the case at bar, save arts. 318, 319 and 320, securing to the surviving wives and children were omitted. This decision of the Supreme Court of Texas, has been very severly criticized by many of the bar in Texas, and by the bench in some instances. The learned presiding Circuit Judge of the Fifth Circuit, having done so, and that learned Court refusing to follow the decision of the Texas Supreme Court in that class of cases.

Notwithstanding the adverse criticisms of the decision of the Supreme Court, the writer of this argument, after long years of his best thought, is convinced from a consideration of the principles of abstract justice, that courts should always seek to enforce as applied to persons, communities and nations, that the judgment of the Supreme Court of Texas in declining to take jurisdiction and assume responsibility of adjudicating rights under the laws of Mexico, in the class of cases involved, was correct, viewed from any standpoint, and especially because it is impossible for any court in Texes, State or Federal, to enter and enforce a judgment in such cases that will secure either plaintiffs or defendants in the rights created by the laws of Mexico. No man can read and study the system of laws of the Republic of Mexico, relating to the

general subject of personal injuries whether resulting in death or not, without being impressed with the objects intended to be accomplished, and that they do and will accomplish when administered as they are evidently enforced by the courts of Mexico. In cases where death results, the purposes of the statute was to protect society against the obligation to support survivors made indigent by the wrongful homicide. Thus a two-fold purpose was provided against, the support of those dependent upon the deceased; and society against the necessity of supporting those persons that would otherwise have been supported by one obligated both by law and nature to do so.

The provision providing that support be secured to be paid in installment monthly, quarterly, semi-annually or annually, instead of damages awarded in a lump sum, is a wise provision and calculated to protect the beneficiaries agains waste and profligacy, and society against pauperism.

The law of Mexico is extremely humane, and yet exacting of the wrongdoer. The decision of the Supreme Court of Texas is based upon correct principles of comity. and if followed will promote the ends of justice, existing between two neighboring Republics.

In another part of this brief, and as submitted in the Circuit Court of Appeals, we distinguished the case at bar from Evey vs. Mexican Central Ry. Co. 81 F. R. 294, and with that we are content, except to say that the decision of the Supreme Court of Texas is evidently best calculated to promote justice.

The petitioners in their brief submit six propositions why they think that the judgment of the Circuit Court of Appeals should be revised and reversed by this Court. Their fifth proposition touching the action of the Circuit Court of Appeals in holding the Circuit Court to have erroneously refused to receive and consider the deposition of Mr. Velasco, as heretofore in this brief been copied

and replied to. The five remaining propositions read as follows to-wit:

FIRST PROPOSITION.

Under the laws of Mexico, a clearly defined right of action exists for damages arising from injuries resulting in the death of a person, against the person whose negligence was the proximate cause of such injuries, there being no contributory negligence on the part of the person injured; such action lies in favor of the surviving wife and minor children of herself and her husband, whose death so resulted.

SECOND PROPOSITION.

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and the right created by those laws not being contrary to the public policy of the State of Texas, nor calculated to injure the State of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal Courts within the State of Texas—and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court.

THIRD PROPOSITION.

Damages for injuries resulting in death, the payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term; but, the support of which the wife and children have been deprived may be considered with other facts in determining the amount of the damages occasioned, and payment of such damages may be enforced in the courts of law of this country without reference to the procedure under the code of Mexico to enforce the payment of alimony.

FOURTH PROPOSITION.

Contingencies having arisen, under which, according to the

law of Mexico, the liability for damages for injuries resulting in death will cease, may be pleaded in abatement, or as a matter of defense, the effect of which would be to bar the remedy, rather than to extinguish the right; but, not having arisen, the court would not be called upon to sonstrue the law relating thereto; and while the action might abate, under the procedure of the foreign country, it would not necessarily abate under the procedure of our country.

SIXTH PROPOSITION.

As a defense to the action the defendant pleaded that damages prayed for in the case, recoverable under the laws of Mexico, was in the nature of alimony or pension, and could be recovered only under the procedure of that country for the recovery of alimony; and that such remedy could not be applied by our courts because of the difference between the laws of the two countries relating to the manner of granting the relief; the proof fails to establish such defense, and the judgment of the trial Court should be affirmed.

Before undertaking to reply to these several propositions, we will again call this Court's attention to the erroneous statement made by petitioners p. 16 of their brief, as to the agreement touching the laws of Mexico, as is evidenced by their own reference to the record p. 19. There was no agreement that the laws plead by plaintiffs and set out in full in their original petition were, or "are the laws of Mexico having application to this case," as stated by petitioners on page 16 of their brief, Record p. 19.

We submit in reply to petitioners first proposition, that the damages sought to be recovered by petitioners, is compensation for that support and maintenance given by Wflliam H. Slater, deceased, in his life time to petitioners, and this right secnred by the laws of Mexico, the country where the cause originated is in the nature of alimony or pension.

2nd. That petitioners must recover, if at all, upon the al-

legations as made in their pleading, upon proof sustaining the allegations as made in the court, whose jurisdiction is invoked.

In 2nd paragraph of petitioners petition it is alleged that plaintiff Lena M. Slater is the surviving wife of William H. Slater, deceased, and that the co-plaintiffs are the minor children of Lena M. and William H. Slater. Paragraph 7 plaintiffs set up the respective ages of plaintiffs and further allege "that William H. Slater at time of his death was 43 years old, and that he was an experienced brakeman; that be was in good health, was strong, frugal and industrious, and during his life time had performed, and was capable of performing a great deal of labor. He was a man of good moral character, and was sober and industrious, and at time of his death was earning about the sum of one hundred and twenty five ($125.00) dollars per month. That he (was) kind and indulgent to his wife and children, and during his married life he gave practically all of his earnings aforesaid to their *support and maintenance.*"

Paragraph 8 sets up that "decedents expectancy of life, according to the tables of mortality, was about 50 years, and plaintiffs during *their lives*, reasonably expected to receive, and in fact would have received in money fron the earnings of deceased thirty thousand dollars; that plaintiffs were each dependent for their *support* and *maintenance* upon the earnings of deceased, upon which fact and other considerations *particularly the legal obligations of the deceased to support them* and the love and affecfion for them they base their expectations of pecuniary aid from said deceased."

In paragraph 9 Plaintiffs allege that by the laws of Mexico, which now exist and existed and were in force at time and place of happening of the killing of William H. Slater, through defendant's negligence, as aforesaid, they the plaintiffs have had the right of action against the defendant for their damages, and they say that the following were and are the laws of Mexico, applicable to this case, out of which the said right of action grew, and by

virtue of which the same now exists in the said Republic of Mexico, towit: Here follows the translation of the laws of Mexico as plead, including those articles heretofore in this brief grouped and partially analyzed; and including article 325 giving the standard table of mortality that governs the courts of Mexico in adjudicating controversies growing out of the subject. (See record p.p. 2–11.)

The words, clauses and sentences italicised by us in the foregoing excerps from plaintiffs petition, the pleadings upon which the trial in the Circuit Court was had, are made to emphasize the correctness of our contention thar this is a suit to recover that support provided for in arts. 318 and 319 of the Mexican law as plead by plaintiffs (record p. 6) and which the learned Circuit Judge speaking for the Circuit Court of appeals denominates "alimony or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast."

Art. 308, record p. 6, plead by plaintiffs, reads: "The civil responsibility cannot be declared except at the instance of the party entitled to recover." Art. 310 "The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article (311), or that it arise from injury or defamation, and that the offending person having been able in the life time to bring his suit, he neither did nor directed his heirs to sue; in such case the offense shall be understood as remitted."

Art. 311 that must be considered in construing arts. 318 and 319, reads: "The action to enforce civil responsibility demanding *support* of a person guilty of homicide is personal and belongs exclusively to the persons named at the end of art. 318 as directly damaged." The persons named at the end of artilce 318 includes the widow, descendant and ascendants of the deceased. It therefore follows that under these laws and the allegations as contain-

ed in plaintiffs pleadings, that the rights recoverable, is that of a support that is in the nature of alimony or pension, and that the Circuit Court cannot administer such relief consistent with its own forms ot procedure and trials, and give to the parties that protection that the laws of the country where the cause originated, provide.

Counsel for petitioners have not in their brief seen proper to attempt any analysis of the laws of Mexico, nor do they refer this court to any authority in support of their first proposition, contenting themelves by quoting an excerp from the opinion of Judge McCormick, without in any manner taking notice of its connection with the general subject under consideration.

We, therefore, submit that our proposition contra to theirs, is sustained by their own pleading and laws plead, and that while as an abstract proposition of law, they may be correct, it does not at all, follow, that the judgment of the Circuit Court of Appeals should be reversed. But upon the contrary it does appear that it should be affirmed.

We submit contra to petitioners second proposition, that the fact that this is a suit for the recovery of damages account of personal injuries resulting in death, and that such is, or is not transitory in its nature, does not give to plaintiffs the right to appeal to our courts to enforce a foreign law, but that the courts of this country will or will not take jurisdiction according to their own discretion, and that in all cases where the merits and rights of a controversy depends upon a foreign law of doubtful meaning, or wherefrom the nature of our own procedure of trials, our courts are unable for any reason to intelligently administer such foreign law, so as to fully and completely protect the parties involved in all their rights, as provided in such foreign law. then our courts both State and Federal. will decline to exercise jurisdiction and assume such responsibility as would necessarily attach.

The questioh as to whether or not the Circuit Court of the

United States, or the State Courts shall refuse to exercise jurisdiction of controversies arising under a foreign law, does not wholly depend upon whether such laws are similar or unlike, or whether they are materially different from the laws of the forum, but the principle and controlling reason is, can the courts of the forum, according to their own powers and forms of procedure, administer the foreign law, so as to fully protect all of the parties, both plaintiffs and defendants in all of the rights secured to either under the foreign law? If this cannot be done, then jurisdiction should be declined, especially so in every instance, where it appears that the jurisdiction is invoked for mere convenience and not from any necessity. Plaintiffs in this suit base their right of recovery upon a foreign law, a necessary allegation in the class of cases to which this case belongs, to show a right and by these laws, the rights of the parties must be determined. Story says: "It would be as unjust to apply a different law as it would be to determine, the rights of parties by a different transaction." (Story on conflt. of laws, Sec. 38).

The above elementary rule has been recognized as sound by this court in every case adjudicated by this Court demanding its application. In Dennick vs. Ry. 103 U. S. 11, cited by plaintiffs, Justice Miller giving voice to this Court says: "But the Courts of New York are as capable of enforcing the rights of the widow and next of kin as the Courts of New Jersey. *And as the court which renders the judgment for damages in favor of the administratrix, can only do so by virtue of the New Jersey Statute,* so any court having control of the administratrix can compel distribution of the amount received in the *manner prescribed* by that Statute.

This Court in the case above quoted, in another part of the opinion, says: "it is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it, is in any manner dependant on this question whether it is a statutory right, or a common law right.

Whenever, by either the common law, or the *Statute law of a State*, a right of action has been become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

The foregoing statement was evidently intended to apply to rights and legal liabilities that have become fixed at common law, or under Statutes of any of our domestic States, composing our own dual form of government. But whether so limited or not, it is immaterial to this discussion, as it is clearly announced by the learned judge speaking for this Court that the court entertaining jurisdiction can only do so by virtue of the laws of the country where the cause originated, and enforce such judgment in the manner prescribed by the Statute of such foreign state or country.

It therefore follows that we must determine 1st. the nature of the suit of plaintiffs as alleged in their complaint or petition filed in the Circuit Court: 2nd. the nature of the right secured by the laws of Mexico, the country where the cause originated; and 3rd. whether the rights secured by the laws of Mexico, are such as this court can intelligently administer under its own form of procedure and trial, enforcing the rights of the parties as prescribed by the foreign statutes plead.

As heretofore in this brief demonstrated, there is no escape from the conclusion that this is a suit by plainriffs as surviving wife and children to recover of defendant company that support given to them by the deceased, William H. Slater, during his life time (see paragraphs 7, 8 and 9 of plaintiffs petition, record p. p. 3, 4 and 5) as heretofore copied into this brief.

This suit by no possible construction of the affirmative allegations of plaintiffs, can be made to comprehend or authorize the recovery of that measure of damages the deceased William H. Slater would have been entitled to recover had his injuries not

resulted in death. His rights, if living, are fixed by Arts. 301, 304, 305 and 306, as qualified and limited by other provisions of the Statute law plead.

Art. 301 reads: "The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable to make (1) restitution, (2) reparation, (3) indemnization and (4) payment of judicial expenses."

Art. 304 reads: Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission, complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

Art. 305 reads: Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an omission by which formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306 reads: "The condition required by the two preceding articles (Arts. 304 and 305) that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have occurred; if they proceed directly from, and a necessary consequence of the same act or omission from which resulted the previous damages or injuries."

This latter article clearly shows that Arts. 304 and 305 refer to and fix the rights of the injured party in cases where he is the actor himself claiming damages resulting to "him and his family

or a third person" by reason of such injury; and while this right under the provisions of Art. 310 "forms a part of the estate of a decedent and descends to his heirs and successor." The same is immaterial in this case, because there is no allegation in plaintiffs petition claiming such damages, as the decedent would have been entitled to recover under such laws for such act or omission, had he been the plaintiff instead of his surviving wife and children. If the decedent had not been killed by his injuries, upon suit by him the measure of his damages, while of doubtful interpretation, may include perhaps, "the value of the time lost by him during the period necessary for his cure and while disabled from his injuries to work and labor, taking into consideration, the nature of his business and the value of his services in conducting the same; second, fair compensation for the mental and physical suffering caused by the injury; third the probable effect of the injury in future upon his health and use of his limbs, and his ability to labor and attend to his affairs, and generally any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done, "and in addition such actual damages as "his family" or "some third person" may have suffered as the direct and proximate result of his injuries.

There is absolutely no allegation in plaintiffs petition authorizing the application of the foregoing measure of recovery. But this is unquestionably a suit for the recovery of that support to which plaintiffs have been deprived of by reason of the death of William H. Slater. This right is provided for in Arts. 318, 319 and 320. Art. 318 reads: "The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being sup-

ported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave."

There is no allegation of any expenditure for burial of the body of deceased. Nor is there any allegation of any expenditure made for the cure of the deceased. Nor of any damages his death caused to the property of the deceased. Thus we find that the damages resulting to plaintiffs by reason of the withdrawal of that support given by deceased in his life, is all that can be considered in response to the pleadings.

This support is limited by article 319, a part of the same general system of law, and containedin same book, as the one providing for a suppor. This art. reads "The obligation to furnish support shall last during all the time deceased might have lived if the homicide had not killed him, and that shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitations of *this rule* the obligation shall cease: 1 At whatever time it *shall not be absolutely necessary* for the subsistance of those entitled to receive it: 2 When those beneficiaries get married; 3 When the minor children become of age: 4 In any other case in which, according to law, the deceased, if alive, would not be required to continue the support."

These limitations upon the obligation, form a part of the statute giving and providing for the support and must of necessity be provided for in any judgment rendered for the recovery of such support. They are a part of the same chapter following in numerical order, the article creating the obligation of support, and according to well recognized rules of construction and interpretation must be considered as a part of the stature fixing the merits and rights.

In conclusion of this reply to petitioners 2nd. proposition, we

say that it clearly appears immaterial whether a "civil action for damages for injuries resulting in death under the laws of Mexico is a personal action, transitory in its nature"; or whether the right created by these laws "is contrary" or not "to the public policy of Texas, or whether or not, it is "calculated to injure the State of Texas or the United States or their citizens", as the question ultimately is, can our Courts Federal or State, intelligently entertain jurisdiction and secure to the parties the rights secured to them under the laws of Mexico? And especially, can the Circuit Courts, as common law courts, do so? The propounding of these queries is in our opinion to demand an answer that they cannot.

"It is obvious, and it has always been held, that the Circuit Court cannot, in a trial of an action at law, exercise the power of a court of equity. See Security Trust Co. vs. Black River Nat. Bank 187 U. S. p. 237.

The relief, merits and rights of the parties to this controversy, as created by the laws of Mexico, contemplate the exercise of powers by the Courts and judges never conferred upon or exercised by a common law court, not even in jurisdictions where the distintions between law and equity have been abolished.

Our reply to petitioners 1 and 2 propositions sufficiently answer their 3 proposition as made, and we pass it without further notice.

We are extremely doubtful as to whether we should dignify petitioners 4th proposition with any reply, and it is only because of our high appreciation of the ability of counsel that we do so.

The question evidently intended to be made by counsel in their 4th proposition, is, that the limitations upon the obligation of support as contained in Art. 319, heretofore copied into this brief, constituted under certain contingencies matters of defense to be pleaded in abatement protanto in proportion as they may

arise, etc. This is so evidently unsound, that it really requires no answer.

But we submit, as these limitations are a part of the same chapter, following next in numerical order art. 318 creating the right of support, defining what is meant by the obligation to furnish support, that they are not matters of defense, but are a part of the right itself, that must be taken into consideration by any court undertaking to administer the laws of Mexico in such matters. See authnrities and reasons given in our reply to petitioners 1 & 2 propositions in this brief.

Counsel in support of this proposition cite B & O. Ry. Co. vs. Jay, 173 U. S. 226, as authority in support of their 4th proposition, quoting the question certified by the Circuit Court of Appeals, 6th. Circuit, and the concluding paragrah of the opinion. As we view the questions involved in case at bar, and in the case cited, we are totally unable, to appreciate how by any process of reasoning the decision in that case has any application to the question raised by the petitioners proposition. In B & O. vs Jay, it appearse that John A. Hervey, a citizen of Ohio, on Oct. 18th, 1891, was a passenger on a train of the B & O. Ry. between Chicago, Ills. and Fostoria, Ohio. While upon the train as a passenger he was injured at Albion, Indiana in a collision caused by the negligence of the railroad company. He brought suit in the common pleas court, Hancock County, Ohio, to recover damages for the personal injuries he had thus received.

Upon petition of the railroad the suit was moved into the Circuit Court of the United States for Northern District of Ohio. After such removal Hervey died, and against the objection of the railroad. the action was revived in the name of the administrator of the deceased appointed by the proper court in Ohio. That in such cases the right of revival existed in the Courts of Ohio at time the cause was removed by the railroad into the U. S. Circuit Court. This Court in that case simply held that the right to

revive the suit in the name of the representative, as it existed under the laws of Ohio was a substantial right that "inhered in this action and accompanied it when in the life time of Hervey the Federal Court acquired jurisdiction of the parties and the subject matter. And that this right could not be defeated by reason of the provisions of Art. 955 Revised Statutes of the U. S,

Therefore the question in that case was, did the suit instituted by Hervey, the injured person, in his life time to recover damages, abate? or did it revive in favor of his representatives. In the case at bar, Slater, the injufed person instituted no suit in his life time, nor do the plaintiffs by any allegation seek to recover any measure of damages that Slater would necessarily have sought to recover, had his injuries not resulted in death, and he had been sueing to recover damages account of his injuries. There is absolutely no analogy between the case cited and the case at bar, and we are unable to understand why counsel of ability should cite the B & O. Ry. vs. Jay as authority in support of their proposition. The statement of counsel (page 23 of their brief) to the effect "had any such contingencies arisen after institution of suit, the case cited would indicate the course to be taken, viz: that the cause proceed to judgment according to the laws of the forum," is absolutely unsound, according to all authority.

We submit in reply to petitioners sixth proposition, that in so far as it undertakes to state defendants defenses as plead (record pages 14 & 15), it is erroneous and misleading in that it ignores the fact that plaintiffs interposed to said defenses as plead, a general and special demurrer (record p. 16), which demurrers the Circuit Court sustained (record p. 20) to which action of the Court defendant saved its bill of exceptions (record p. 34–36), and upon which bill, defendant assigned error; (record p. 65) and therefore the fact, if a fact, that the proof fails to establish such defense, would not justify an affirmance of the judgment.

We submit further that the defenses plead, appearing to be

the result or conclusions necessarily to be drawn from a proper construction of the Statute laws of Mexico plead by plaintiffs as a basis of their rights secured under the laws of Mexico, forming a substantive part of and attaching to the merits and rights under the foreign law plead, were proved by plaintiffs, when they introduced translations of the laws plead by them.

This proposition of ours is evidently sound, as clearly demonstrated in our argument in reply to petitioners 1st and 2nd propositions, as well as in other portions of this brief.

In conclusion of this brief and argument, without undertaking to offer in support of our 5th, 6th, 7th, 8th, 9th, and 10th assigned errors in addition to those given in another part of this brief, other than to call this Court's attention briefly to the fact, that the trial court, absolutely, in his charge to the jury, ignored the laws of Mexico plead, except to direct the attention of the jury to Art. 52 (Record p. 11) which reads: "The coaches and cars which enter into the makeup of a train shall have draw-heads of the same height, so that their centers will be opposite to each other." But upon the contrary charges the law "in reference to the duty of a railroad or master to employes, as defined by decisions of this Court, and as to the measure of damages to be allowed, the measure fixed by the Statutes and decisions of Texas in each branch citing the jury to the decisions record p. p. 59, 60 and 61. In doing this the able trial judge ignored the elementary rule, that the law of the place or country where the cause originated governs as to the merits and rights, and that "it would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction."

We submit for reasons stated that the conclusions reached by the learned judge speaking for the Circuit Court of Appeals, are sound, just and reasonable, and that the judgment of that Court, reviewing the judgment of the Circuit Court. with directions to sustain our exception No. 2 filed March 18th, 1901, should be

affirmed by adding that our exceptions filed December 4th, 1900, be also sustained.

Respectfully submitted,

THE MEXICAN NATIONAL RAILROAD COMPANY

By Thos W Dodd and

DENMAN, FRANKLIN and McGOWN,
Attorneys of Record for Defendant.